Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

ARNALDO CABRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in ruling that Cabrera's unconditional guilty plea acted as a waiver of his right to appeal the government's decision to avoid the speedy presentment requirements of the Constitution and the Rules of Criminal Procedure?

2. Is a "waiver of speedy presentment," entered into by the Government and an indicted defendant who is the subject of a judicially ordered arrest warrant, invalid?

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

Only Petitioner Arnaldo Cabrera and Respondent United States of America were parties to the proceedings in the Court of Appeals. The parties have no parent or subsidiary companies and do not issue stock.

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PETITION FOR A WRIT OF CERTIORARI

Arnaldo Cabrera ("Cabrera") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, 1-8) is reported at *United States v. Cabrera*, 379 Fed. Appx. 24 (2d Cir. 2010). Cabrera's petition for reconsideration or rehearing *en banc* was denied on September 20, 2010. (App., *infra*, 9).

JURISDICTION

The court of appeals rendered judgment on May 26, 2010. A petition for reconsideration and rehearing *en banc* was denied on September 20, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

I. Due Process Clause, U.S. Const., Amdt. V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

II. U.S. Const., Amdt. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

III. Fed. R. Crim. P. 4(b)(1)(C) provides that an arrest warrant must:

command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer;

IV. Fed. R. Crim. P. 5(a)(1)(A) provides in relevant part that:

A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

V. Fed. R. Crim P. 11 provides in relevant part that:

(a) (2) Conditional Plea.

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

* * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant.

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * *

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

* * *

(2) Ensuring That a Plea Is Voluntary.

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement);

INTRODUCTION

First, Arnaldo Cabrera asks the Court to adopt a rule that, in ensuring a guilty plea is entered knowingly and voluntarily, the district court must ask a defendant whether he knows that by pleading guilty he waives appeal of all antecedent claims.

Second, Cabrera asks the Court to adopt a rule barring "waivers of speedy presentment," between the Government and defendants, like Cabrera, who are arrested pursuant to a judicially ordered warrant, as constitutionally invalid.

Arnaldo Cabrera was arrested on narcotics charges, pursuant to an arrest warrant. Instead of being presented to a judicial officer, as ordered by the warrant, government agents and Cabrera entered into an uncounseled "waiver of speedy presentment," intended to facilitate Cabrera's cooperating without being arraigned. After several days of proffers with agents and prosecutors, Cabrera fled the jurisdiction. He was ultimately extradited from the Dominican

Republic.

Upon return, Cabrera unsuccessfully litigated a motion to suppress his post-arrest statements. He ultimately pled guilty without a plea agreement, intending not to be constrained by the government in arguing for a sentence beneath the guidelines, or in filing an appeal. Cabrera did not, however, condition his plea upon being able to contest the denial of his motion to suppress on *Miranda* grounds or the circumstances of his "waiver of presentment." The court, although asking Cabrera if he was aware of a litany of rights that he was relinquishing by pleading guilty, never asked him if he knew that his plea would serve as a waiver of the right to appeal any antecedent constitutional violations.

On Direct Appeal, Cabrera argued that his waiver of speedy presentment was constitutionally invalid. The Second Circuit affirmed Cabrera's conviction, holding that he had waived his right to appeal and therefore declining to reach the merits of his argument.

STATEMENT OF THE CASE

On December 7, 2005, Defendant-Appellant Arnaldo Cabrera was arrested on narcotics importation conspiracy charges, pursuant to a warrant signed by a Magistrate Judge in the Southern District of New York. The warrant was issued upon the prosecutors' application and the

presentation to the Court of an Indictment charging Cabrera with narcotics felonies, thereby transferring legal responsibility for Cabrera's arrest to the Court. The warrant had plainly directed the arresting officers:

> YOU ARE HEREBY COMMANDED to arrest the above-named person and bring that person before the United States District Court to answer to the charge(s) listed below.

(Emphasis in original).

Notwithstanding the Government's decision to invoke the court's power in obtaining an arrest warrant, agents and prosecutors' failing to abide by the judicial order that they "bring that person before the United States District Court to answer to the charge(s)..." in the indictment.

Instead, upon Cabrera's arrest, he entered into an uncounseled "Waiver of Speedy Presentment" with law enforcement agents, and proceeded to make a series of recorded telephone calls and proffer statements in an attempt to obtain a cooperation agreement. The day after Cabrera's initial uncounseled statements, the Assistant United States Attorney provided Cabrera with an attorney, ostensibly pursuant to the Criminal Justice Act (CJA), 18 U.S.C. § 3006. No judge determined

Cabrera's indigence before appointing CJA counsel, as is required both by the Act and the United States District Court for the Southern District's Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act, as approved by the Judicial Council for the Second Circuit. The attorney counseled Cabrera, after having made statements under the waiver of presentment and *Miranda* waiver, to continue to make inculpatory statements and to avoid presentment. He therefore continued to make statements, record phone calls, and provide assistance to law enforcement for a period of approximately four days.

At some point during this process, the government asked the district judge to unseal the indictment so that it could show it to Cabrera, and also informed the court that he was going to cooperate. It is not apparent from the record whether the court was aware that Cabrera was going to be at liberty absent any constraints during this period. In any event, there was never a presentment and a judicial balancing of the factors required under the Bail Reform Act of 1984. 18 U.S.C. §§ 3141-3150. Consequently, there was no judicial officer to apply the Speedy Trial Act, 18 U.S.C. §§ 3161-74, and its public and defendant-related protections either.

Given the danger of the prosecution's principal target, a violent Colombian drug trafficker, and a lack of judicial oversight or terms of release, Cabrera left the jurisdiction. He still had not been presented. He had not been informed of the penalties for non-

appearance as is required under 18 U.S.C. § 3142(h)(2). No bail terms had been set by the Court, nor had the Speedy Trial Act been triggered.

Mr. Cabrera was arrested in the Dominican Republic fourteen months later, and returned to the Southern District of New York on approximately May 17, 2007. Upon arrival, he was finally arraigned. The indictment charged Cabrera with one count of Conspiracy to Distribute and Possess with Intent to Distribute Five kilograms or more of Cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846, and one count of Conspiracy to Import Cocaine, in violation of 21 U.S.C. § 963. A criminal forfeiture count was also included.

The government alleged a Colombian cocaine importation conspiracy, which operated out of Newark International Airport, Newark, New Jersey, and involved at least 2,000 kilograms of cocaine.

Mr. Cabrera moved to dismiss the indictment, suppress his post-arrest statements, and for other relief. He argued that his "waiver of speedy presentment" was involuntary, and that his uncounseled post-arrest statements should be suppressed. On May 8, 2008, Cabrera testified at an evidentiary hearing. On July 15, 2008, the District Court issued a decision, denying Cabrera's motions in their entirety. *United States v. Cabrera*, 2008 U.S. Dist. LEXIS 54773 (S.D.N.Y., July 15, 2008).

On January 28, 2009, Cabrera pled guilty to

both counts of the indictment without a plea agreement. On May 28, 2009, the District Court rejected Cabrera's arguments for a below-Guidelines term of imprisonment, instead sentencing him to 324 months' imprisonment.

On direct appeal, the Second Circuit found Cabrera had waived his right to appeal his conviction under Fed. R. Crim. P. 11(a)(2) by entering into an unconditional plea. The court declined to reach the merits of Cabrera's speedy presentment argument, but affirmed his sentence. *United States v. Cabrera*, 379 Fed. Appx. 24 (2d Cir. 2010).

REASONS FOR GRANTING THE PETITION

I

THE COURT OF APPEALS ERRED IN RULING THAT CABRERA'S UNCONDITIONAL GUILTY PLEA ACTED AS A WAIVER OF HIS RIGHT TO APPEAL THE GOVERNMENT'S DECISION TO AVOID THE SPEEDY PRESENTMENT REQUIREMENTS OF THE CONSTITUTION AND THE RULES OF CRIMINAL PROCEDURE

It is respectfully submitted that, for a plea to be knowing and voluntary, and due process satisfied, the defendant must be informed by the court that, by pleading guilty, he is waiving appeal of any antecedent claims. A rule should be adopted, requiring such inquiry by district judge under Fed. R. Crim. P. 11. It is simply unfair to, on the one hand, not inform a defendant of this fact, instead silently relying on Rule 11(a)(2), while on the other hand, apprising him of a laundry list of rights that are relinquish through the plea.

Currently, case law requires a defendant alleging an invalid appeal waiver to demonstrate that his counsel's advice rendered the plea involuntary. *See Brady v. United States*, 397 U.S. 742 (1970); *McCann v. Richardson*, 397 U.S. 759 (1970);

Tollett v. Henderson, 422 U.S. 258 (1973). This shifting of the burden to the defendant stands in stark contrast to the required allocution under Fed. R. Crim. P. 11, in which the court must question the defendant about numerous specific rights that are being waived, and so determine that the plea is knowing and voluntary.

Furthermore, the Government's failure to honor the rules of criminal procedure and the Constitution in not bringing the defendant to court constituted a flagrant contempt of the court's arrest warrant and jurisdiction. The Government should not, on the one hand, be allowed to seek to avoid, ignore, and deny the jurisdiction of the court, and then argue that Cabrera's argument should not be subject to the exception of appellate waiver set forth in *Blackledge v. Perry*, 417 U.S. 21 (1974), for errors that involve a defendant's "right not to be haled into court," *id.* at 30, as Cabrera was over one year subsequent to the violation, and that affect the very jurisdiction of the Court. This error was not waived, and it resulted in a charge that the Government could no longer constitutionally prosecute, *see Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975). It involved a question of the court's jurisdiction, and remains one of pivotal importance.

This Court has a well-established history of using its "supervisory powers" to create rules governing the procedures of "inferior courts." *See, generally, McNabb v. United States*, 318 U.S. 332 (1943) (supervisory powers to exclude voluntary

confession that was product of prolonged detention); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (supervisory powers to create rule that, "systematic and intentional exclusion" of daily wage earners from juries was prohibited in the federal courts); *Ballard v. United States*, 329 U.S. 187 (1946) (supervisory powers to condemn, "purposeful and systematic exclusion of women" from district court grand and petit juries); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 808-09 (1987) (supervisory powers to forbid inferior court appointment of interested prosecutor in contempt proceedings); *Castro v. United States*, 540 U.S. 375 (2003) (supervisory powers to create rule that a district court is required to notify a pro se litigant of consequences before recasting motion as a habeas petition).

Arnaldo Cabrera respectfully requests that the Court grant *certiorari* on the question of whether adoption of a rule requiring a court to ask the defendant if he understands that he is waiving the right to appeal his conviction—including prior adverse rulings—by pleading guilty is appropriate, and whether Cabrera's "waiver" was involuntary given this gap in his allocution.

II

A "WAIVER OF SPEEDY PRESENTMENT," ENTERED INTO BY THE GOVERNMENT AND AN INDICTED DEFENDANT WHO IS THE SUBJECT OF A JUDICIALLY ORDERED ARREST WARRANT, IS INVALID

Mr. Cabrera was arrested pursuant to an arrest warrant that was sought by prosecutors and ordered by a magistrate. The prosecutors had already indicted Cabrera, and made a calculated decision to invoke the jurisdiction of the court in detaining him. By placing the matter before the court and asking it to order Cabrera's loss of liberty, prosecutors were plainly "commanded" to return Cabrera to the court, so that it could exercise its legal obligation to consider and weigh the various statutory factors enumerated in the Bail Reform Act in determining whether Cabrera should be detained or released and the terms of release, if any. The responsibility for determining whether to order bail and its conditions is a function that by law is delegated only to a Court.

The precise question of whether a defendant's waiver is sufficient to stay the court's order of arrest that he be brought "before the United States District Court to answer the charges" contained in a formal

complaint or indictment was one of first impression in the circuit courts, and is a question of first impression here. The only published opinion to squarely address this issue appears to be *United States v. John/Jane Doe*, 564 F.Supp. 2d 480 (D.Md. June 2008), in which the Court, *sua sponte*, issued an opinion rejecting the defendant's *counseled* "Waiver of Speedy Initial Presentment." *Id.* at 482. Other cases in which speedy presentments are present either do not question their propriety, *see, e.g., United States v. Noorzai*, 545 F.Supp.2d 346 (S.D.N.Y. 2008) (denying motion to dismiss on other grounds); *United States v. Pena-Ontiveros*, 547 F.Supp.2d 323 (S.D.N.Y. 2008) (suppressing statements on other grounds); *United States v. Stern*, 313 F.Supp.2d 155 (S.D.N.Y. 2003) (rejecting defendant's motion to compel 5K1.1 letter, or to suppress statements), or do not involve defendants for whom arrest warrants were issued by a judicial officer. It is curious to note, and only underscores the aberrance of the practice, that the only other published decisions in the entire country that make reference to waivers of speedy presentment are within the Southern District of New York.

In *John/Jane Doe*, the Court had earlier ordered prosecutors to either present the defendant for arraignment on the complaint pursuant to the Court-ordered arrest warrant, or to dismiss the charges. Faced with the choice, the prosecutors dismissed. The Court's Memorandum Opinion was intended to "distinguish [] procedure that is lawful from that which is not." *Id.* at 483.

To start, the plain language of Fed. R. Crim. P. 4(b)(1)(C) and 5(a)(1)(A) mandate a defendant's speedy presentment before a judicial officer—*not* an agent or prosecutor.

Rule 4(b)(1)(C) requires that the form of an arrest warrant:

> (C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer;

Rule 5(a)(1)(A) states that:

> (A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

The question of whether to grant bail is also not to be resolved in a side-deal between the government and defendant. For this reason, Fed. R. Crim. P. 5(d)(3) requires that, in every felony case:

> (3) The judge must detain or release the defendant as provided by statute or these rules.

The salient statute, the Bail Reform Act, 18 U.S.C. § 3141-3150, is applied through judicial action alone. There is also no provision in the Rules of Criminal Procedure for "waiver of speedy presentment" by agreement between the prosecution and a defendant. Nor can a judge avoid his or her obligation to make the findings of fact that are required under the Bail Reform Act. Instead, once presented as required, under Rule 5(d)(3) the Court must detain or release the defendant upon making specific, mandatory findings under the statute.

It is a court alone that is empowered, indeed required, to make assessments of a defendant's danger to the community and risk of flight. These interests, "obviously extend well beyond the interests of the defendant, may well cut across those interests, and, therefore, are not 'rights of the defendant' that he/she can waive." *John/Jane Doe*, 564 F.Supp.2d at 482; *see also*, Bail Reform Act, 18 U.S.C. § 3141 *et seq.*

In *John/Jane Doe*, the Court held the prosecution's agreement with the defendant and his attorney to "waive" the obligation of speedy judicial presentment to be invalid for irrefutable reasons:

> Once the government decides to place a criminal defendant within the jurisdiction of the Court by seeking a criminal complaint against the defendant and a warrant for that

> defendant's arrest, the responsibility for determining whether and under what conditions the release of that defendant is to be granted is a function delegated by law solely to the Court.
>
> In the instant case, the government has placed the defendant within the jurisdiction of the Court but by only partially carrying out the order of the Court—that is, arrest without presentment—the government has *de facto* retained unto itself the power and responsibility to determine whether the defendant shall be released and the conditions of that release. There is no authority in law for such action by the government. *Cast a different way, once the jurisdiction of the Court has been invoked, the government and the defendant are not empowered to agree among themselves to forestall the involvement of the Court on the issue of whether and under what conditions a criminal defendant will be set free.*

Id. at 482. (emphasis supplied) (footnotes omitted).

Waivers of speedy presentment thwart the statutory balancing of the public's concerns that a court is required to consider against those of the government or a defendant as they relate to a defendant's pre-trial release. While in setting bail or

not a court must concern itself with a defendant's risk of flight and danger to the community, including his potential for obstructing justice, *see, e.g.*, 18 U.S.C. § 3142(f)(2)(A) and (B), a prosecutor's mandate is only to zealously investigate and prosecute crimes. Indeed, "that zeal might well color a risk/reward analysis measure applied by the government to a decision as to whether, for example, a cooperating defendant should remain free." *John/Jane Doe* at 483, fn 5.

Waivers of speedy presentment illegally circumvent not only the protections afforded the public under the Bail Reform Act, but also those afforded to the public and defendants under the Speedy Trial Act, 18 U.S.C. §§ 3161-74, which would otherwise be triggered at the moment of the defendant's original presentment. A waiver of speedy presentment thus not only serves to avoid the plain mandates of three Rules of Criminal Procedure and the Bail Reform Act, but also acts as the equivalent of a proactive waiver of the Speedy Trial Act for all purposes. This Court has expressly held such waivers to be impermissible. *See United States v. Zedner*, 547 U.S. 489 (2006) (since a defendant may not prospectively waive the application of the Speedy Trial Act, petitioner's waiver "for all time" was ineffective).

Here, the waiver of speedy presentment was intentionally designed to circumvent: (1) the Rules of Criminal Procedure, (2) the Bail Reform Act, (3) the Speedy Trial Act, (4) the Criminal Justice Act, (5) the

Southern District's plan for the appointment of CJA counsel, and (6) was a colorable violation of a court order, see, e.g., 18 U.S.C. § 401(c)(3) ("A court of the United States shall have power to punish by fine or imprisonment, or both, at it discretion, such contempt of its authority, and none other, as—(3) Disobedience or resistance to it lawful writ, process, order, rule, decree, or command.") It is therefore respectfully submitted that the waiver of speedy presentment was invalid, Cabrera's Fifth, Sixth, and Due Process rights have been violated, and, since it is here literally impossible to return him to his original state, his conviction must be reversed and his Indictment dismissed with prejudice.

Given the importance of this issue, Cabrera's petition should be granted.

CONCLUSION

It is respectfully requested that the Court grant Arnaldo Cabrera's petition for a writ of certiorari.

Respectfully submitted,

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December 18, 2010

09-2553-cr USA v. Cabrera

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the twenty-sixth day of May, two thousand and ten.

PRESENT:
JOSÉ A. CABRANES, ROBERT A. KATZMANN,
Circuit Judges, J. GARVAN MURTHA,
District Judge.*

- x

UNITED STATES OF AMERICA,

Appellee,

v. ARNALDO CABRERA,

Defendant-Appellant,

JOSE VASQUEZ and MILKA SALGUERO,

Defendants.**

----------x

No. 09-2553-cr

* The Honorable J. Garvan Murtha, Senior Judge, of the United States District Court for the District of Vermont, sitting by designation.

** The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

1

FOR DEFENDANT-APPELLANT: FOR APPELLEE: JOSEPH BONDY, The Law Offices of Joseph A. Bondy, New York, NY.

MARIA E. DOUVAS, Assistant United States Attorney (Preet Bharara, United States Attorney, Diane Gujarati, Assistant United States Attorney, on the brief), Office of the United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Naomi

Reice Buchwald, Judge).
UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Defendant-appellant Arnaldo Cabrera ("defendant" or "Cabrera") appeals from a judgment of conviction entered June 4, 2009. Defendant was convicted, after entering a plea of guilty, of (1) conspiring to distribute and possessing with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 812, 841(a)(1) and (b)(1)(A) (Count One); and (2) conspiring to import into the United States a controlled substance in violation of 21 U.S.C. §§ 952, 960(a)(1), and (b)(1)(B) (Count Two). On May 28, 2009 he was sentenced principally to 324 months' imprisonment.

On appeal, defendant argues as follows: (1) that his "waiver of speedy presentment" was invalid, thereby requiring dismissal of the indictment with prejudice, (2) that his post-arrest statements should have been suppressed on account of the defective "waiver of speedy presentment," and (3) that his sentence is both procedurally and substantively unreasonable. We assume the parties' familiarity with the remaining factual and procedural history of the case.

We conclude that, by entering an unconditional guilty plea, Cabrera waived the first two challenges he raises on appeal. It is well settled that "[a]

knowing and voluntary guilty plea waives all nonjurisdictional defects in the prior proceedings." *United States v. Coffin*, 76 F.3d 494, 496 (2d Cir. 1996); *accord United States v. Lasaga*, 328 F.3d 61, 63 (2d Cir. 2003). To reserve an issue for appeal after a guilty plea, "a defendant must obtain the approval of the court and the consent of the government, and he must reserve the right to appeal in writing." *Coffin*, 76 F.3d at 497 (citing Fed. R. Crim. P. 11(a)(2)). Because Cabrera's challenges concerning the validity of his waiver of speedy presentment are not jurisdictional, he waived any right to raise them on appeal by entering an unconditional plea of guilty.

2

Defendant responds that he was never advised by the District Court during the plea colloquy that he was giving up his right to appeal, and therefore he did not knowingly and voluntarily waive his appellate rights. In support he draws our attention to cases in which we have held that a defendant's waiver of the right to appeal a sentence must be knowing and voluntary. *See United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996) ("[W]aivers of the right to appeal a sentence . . . are invalid unless they are voluntary and knowing."); *United States v. Tang*, 214 F.3d 365, 368 (2d Cir. 2000) (noting that a waiver of the right to appeal from a sentence "would likely be unenforceable . . . because of the District Court's failure to ascertain that the waiver was fully understood and voluntary").

Defendant's argument is misplaced. Although we require district courts to ascertain whether a waiver of the right to appeal a sentence—a waiver that is prospective in nature—is fully understood by a criminal defendant, we have never required that defendants be informed that by pleading guilty they waive the right to appeal defects in the prior proceedings. *Cf. Ready*, 82 F.3d at 558 (explaining that waiver of "the very valuable right to correct a district court's unknown and unannounced sentence" "requires the special attention of the district court" (emphasis added)). The Federal Rules of Criminal Procedure recognize this distinction. Rule 11(b)(1)(N) requires a district court, before accepting a guilty plea, to inform the defendant of "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N) (emphasis added). There is, by contrast, no similar provision requiring that a defendant be informed of the right to appeal prior adverse decisions. Furthermore, Rule 11(a)(2) makes clear that, by entering a plea of guilty, a defendant automatically waives his right to appeal from prior adverse determinations unless the defendant takes affirmative steps to reserve appellate review. *See* Fed. R. Crim. P. 11(a)(2).

We conclude, therefore, that defendant waived his right to challenge on appeal the validity of his "waiver of speedy presentment" notwithstanding the fact that he was not explicitly informed of that consequence at the time he entered a plea of guilty. *See United States v. Broce*, 488 U.S. 563, 573 (1989)

("Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty.").

Although Cabrera has not waived his right to challenge his sentence on appeal, we conclude that his sentencing challenges are also without merit. Our review of the District Court's sentence is limited to examining it for reasonableness, which is akin to review under an "abuse of discretion" standard. *See United States v. Cavera*, 550 F.3d 180, 187-88 (2d Cir. 2008) (*en banc*); *see also Gall v. United States*, 552 U.S. 38, 41 (2007) ("[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."). This standard applies "both to the [substantive reasonableness of the] sentence itself and to the procedures employed in arriving at the sentence." *United States v. Verkhoglyad*, 516 F.3d 122, 127 (2d Cir. 2008) (internal quotation marks omitted).

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Cabrera asserts that the District Court erred procedurally in applying sentencing enhancements for his role as an "organizer or leader of a criminal activity that involved five or more participants," *see* U.S.S.G. § 3B1.1(a), and for his obstruction of justice, *see* U.S.S.G. § 3C1.1. He also contends that the District Court failed adequately to consider and balance the factors set forth in 18 U.S.C. § 3553(a).

We find no error in the District Court's application of the two sentencing enhancements. The § 3B1.1(a) enhancement is supported by evidence in the record demonstrating that Cabrera recruited and controlled a number of participants in the charged drug conspiracy. The § 3C1.1 enhancement is supported by the District Court's findings that Cabrera fled the jurisdiction after indictment and committed perjury at an evidentiary hearing on his motion to suppress.

We also find no error in the District Court's consideration of the 18 U.S.C. § 3553(a) factors. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.").

Finally, to the extent it is asserted by defendant, we find no substantive error in the District Court's decision to impose a sentence of 324 months' imprisonment. *See Cavera*, 550 F.3d at 189 (noting that we will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions" (internal quotation marks omitted)); *see also United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009) (explaining that substantive unreasonableness is akin to the

"manifest-injustice," and "shocks-the-conscience" standards employed in other contexts).

CONCLUSION

We have considered all of defendant's arguments and find them to be without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT, Catherine O'Hagan Wolfe, Clerk of Court

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UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United Sates Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand-ten

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Docket No.[s]: 09-2553-cr

United States of America,

Appellee,

v.

Jose Vasquez, Milka Salguero,

Defendants.

Arnaldo Cabrera,

Defendant-Appellant.

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Appellant Arnaldo Cabrera fled a petition for panel rehearing or, in the alternative, for rehearing *en banc*, and the panel that determined the peal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court